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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 486

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA AND PAUL WALKER, E. R. HUGHES AND C. C. CHILDERS, ET AL., APPELLANTS,

vs.

CHAMPLIN REFINING COMPANY, APPELLEE.

REPLY BRIEF OF CHAMPLIN REFINING COMPANY, APPELLEE.

JAMES M. BECK,
HARRY O. GLASSER,
GEO. S. RAMSEY,
HORACE G. McKEEVER,
EDGAR A. DE MEULES,
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Champlin Refining Company.

(36,300)

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Statement.

The question presented herein concerns the validity of Sections 8 and 9 of the Oklahoma "Curtailment Act" (Sec. 7961, 7962, C. O. S. 1921), which sections are commonly known as the penalty sections of said Act. These sections read as follows:

> "Section 8. That in addition to any penalty that may be imposed by the Corporation Commission for contempt, any person, firm, or corporation, or any officer, agent or em-

ployee thereof, directly or indirectly *violating the provisions of this act*, shall be guilty of a misdemeanor, and upon conviction thereof, in a court of competent jurisdiction, shall be punished by a fine in any sum not to exceed five thousand dollars ($5,000.00) or by imprisonment in the county jail not to exceed thirty (30) days, or by both fine and imprisonment.

"Section 9. That in addition to any penalty imposed under the preceding section, any person, firm or corporation, *violating the provisions of this act*, shall be subject to have his or its producing property placed in the hands of a receiver by a court of competent jurisdiction, at the suit of the State through the Attorney General, or any county attorney, but such receivership shall only extend to the operating of producing wells and the marketing of the production thereof, under the provisions of this act.' (Italics ours.)

The three judges of the trial court were unanimously of the opinion that these penalty sections were void as in violation of the Federal Constitution. The opinion of Judges Cotteral and Phillips on this proposition held as follows:

"The statute has a dual aspect: First, as a penal statute to prevent waste and to protect the co-equal rights of the several owners of land situate over a common pool of oil and

gas to take from the common source of supply; and, second, a regulatory statute to be supplemented by rules, regulations and orders of the Commission to accomplish the same end.

"The penalties provided are for violations of the statute and no penalties are provided for violations of the rules and regulations promulgated by the Commission.

"We are of the opinion that the statute is too indefinite and uncertain to be sustained as a penal statute. Smith v. Cahoon, Sheriff, 283 U. S. (553). An oil operator should not be required at the peril of severe criminal penalties to determine in the operation of his oil and gas wells whether he is committing economic waste or producing in excess of reasonable market demands because such terms are not defined in the Act and are of uncertain and doubtful meaning. Likewise, a producer from a common source of supply should not be required to determine at the peril of such penalties whether he can operate at full production without committing economic waste or producing in excess of reasonable market demands.

"Furthermore, it is unreasonable to require an operator to choose between two approved methods of operation, the results of which

cannot be forecast with precise accuracy, in dealing with the ordinary problems confronted in the drilling and operation of oil and gas wells, at the peril, if he makes the wrong choice that some underground waste will result and he thereby becomes subjected to such severe penalties, under a statute which affords no guide for the operator under such circumstances. However, except in one particular hereinafter mentioned, 'the validity of the Act as a penal statute is not before us." (R. Vol. 1, Pt. 2, p. 222.)

* * ** *

"The facts with reference to such proceedings are set forth in paragraph 34 of the Third Amended and Supplemental Bill of Complaint and need not be repeated here. They are predicated on the provisions of section 9 of the Act. This provision is penal in character and is for the purpose of punishing violations of the provisions of the Act itself, (not the orders of the Commission), as a criminal statute. For the reasons hereinbefore indicated, we think this section is void and that such proceedings in the state courts should be enjoined." (R.Vol.1, Pt.2, p.228).

The separate opinion of Judge Kennamer, although dissenting as to the validity of the other sections of the Act, concurred as to the invalidity of the penalty sections:

"I concur in the opinion of the majority of the court, holding the penalty provisions of the Conservation Act unconstitutional." (R. Vol. 1, Pt. 2, P. 229.)

* * * * *

"The conclusion reached by my distitnguished colleagues 'That the statute is too indefinite and uncertain to be sustained as a penal statute,' cannot be seriously controverted. The drastic provisions of the statute subject an oil operator to a penalty of $5,000.00 fine, 30 days in jail, or both, in the discretion of the court when such operator committed economic waste, underground waste, waste incidental to production in excess of reasonable market demands, and that his property in a suit by the State, through the Attorney General or any County Attorney, may be placed in an indeterminate receivership. It was held in Connally v. General Construction Co., 269 U. S. 385, 70 Law Ed. 322, 46 S. C. 126, that 'Any statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" (R. Vol. 1, Pt. 2, pp. 233 and 234.)

Argument.

I.

The Penalties Provided in Sections 8 and 9 are for Violation of the Prohibitions of the Act, as Distinguished from the Rules of the Commission.

As stated by the trial court, the Act by its terms prohibits, first, the production of oil in such a manner as to constitute waste as therein defined; and, second, it gives authority to the Corporation Commission to prescribe rules regulating such production.

Sections 1, 2, 3 and 4 of the Act contain prohibitions *which may be enforced by the Attorney General of the State or any County Attorney regardless of any omission on the part of the Corporation Commission.*

The defendants, in fact, admit in their brief that:

> "It is not at all certain that any order or finding of the Commission is a condition precedent to the institution of proceedings by the Attorney General or the County Attorney under Section 9."

For example, Sections 1 and 3 read:

> "Section 1. That the production of crude oil or petroleum in the State of Oklahoma, in such manner and under such conditions as to constitute waste, is hereby prohibited."

* * * * *

"Section 3. That the term 'waste' as used herein, in addition to its ordinary meaning, shall include economic waste, underground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands. The Corporation Commission shall have authority to make rules and regulations for the prevention of such wastes, and for the protection of all fresh water strata, and oil and gas bearing strata, encountered in any well drilled for oil."

These two sections, when construed together, prohibit "the production of crude oil or petroleum in the State of Oklahoma, in such manner and under such conditions as to constitute waste", "economic waste, underground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands".

In addition, Section 2 prohibits "the taking of crude oil or petroleum from any oil-bearing sand or sands in the State of Oklahoma at a time when there is not a market demand therefor at the well at a price equivalent to the actual value of such crude oil or petroleum * * * * *"

Also Section 4 prohibits the taking of crude oil in excess of market demands as follows:

> "That whenever the full production from any common source of supply of crude oil or petroleum in this State can only be obtained under conditions constituting waste as herein defined, then any person, firm or corporation, having the right to drill into and produce oil from any such common source of supply, may take therefrom only such proportion of all crude oil and petroleum that may be produced therefrom, without waste, as the production of the well or wells of any such person, firm or corporation, bears to the total production of such common source or supply."
>
> * * * *

Section 9 then provides that any person "*violating the provisions of this act*, shall be subject to have his or its producing property placed in the hands of a receiver by a court of competent jurisdiction, at the suit of the State through the Attorney General or any County Attorney".

As the Act reads, either the Attorney General or any County Attorney may enforce the receivership provided in Section 9 against any person who, in the judgment of any "court of competent jurisdiction", has produced crude oil in such manner as to constitute any of the "wastes" described in the Sections above set forth.

The brief of the defendant states, by inference, that the above described prohibitions of the Act do not become operative until the Corporation Commission has entered its rules upon the subject. This contention finds no support from the statute itself. The prohibitions contained in Sections 1, 2, 3, and 4 are absolute. Nothing is contained in the statute which gives the Corporation Commission the exclusive right to define the different classes of waste, which are prohibited thereby. Although Section 3 provides that "the Corporation Commission shall have authority to make rules and regulations for the prevention of such wastes", it does not give the Commission power to prescribe definitely what kind of an act would constitute, for example, "economic waste," nor to determine what kind of an act would be outside of such term. Such authority could be exercised only by a "court of competent jurisdiction" upon suit brought by one of the attorneys of the State as specified in Section 9.

The brief of the defendants states that "under Section 6, jurisdiction is conferred on the Commission to determine any question relating to the enforcement of the act." To plaintiff, however, Section 6, merely means that the Commission is constituted as a court to hear any complaints as to infractions of the law. It does not intimate that the law shall not become operative until the Commission makes its rules, but has entirely an opposite meaning—that the prohibitions of the law are abso-

lute and self executing, and that the Commission may sit as a court to determine whether such prohibitions have been violated.

The provision of Section 1, that "waste" be prohibited (as defined in Section 3) is so positive and so independent of any exclusive jurisdiction of the Corporation Commission, and Section 9 so plainly provides a penalty for violating the provisions of the *Act* as distinguished from the rules of the Commission, that it appears most unreasonable to say that the Act would not become operative until the Commission had entered its rules. Still more unreasonable must it appear to say that any person committing, for example, "economic waste" or "underground waste," whatever these terms may mean, would be immune from prosecution if the Commission had failed or neglected to make rules for the prevention of such wastes.

II.

The Act is so Indefinite That any Penalty Prescribed for the Violation Thereof Constitutes a Denial of Due Process of Law.

This Court, in the case of Cline v. Frink Dairy Company, 274 U. S. 445-483; 71 L. Ed. 1146-1151, in holding the anti-trust law of the State of Colorado unconstitutional, said:

> "We think that the act is so vague and uncertain in its description of what shall con-

stitute its criminal violations that it is invalid under the 14th Amendment."

The Court further said, in stating the general rule applicable to such cases:

> "We are now considering a case of state legislation and threatened prosecutions in a state court where only the 14th Amendment applies, but that requires that there should be due process of law and this certainly imposes upon a state an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required. And such is the effect of our cases. Connally v. General Constr. Co., 269 U. S. 385, 70 L. Ed. 322, 46, Sup. Ct. Rep. 126; International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. Ed. 1284, 34 Sup. Ct. Rep. 853; Collins v. Kentucky, 234 U. S. 624, 58 L. Ed. 1510, 34 Sup. Ct. Rep. 924; American Seeding Mach. Co. v. Kentucky, 236 U. S. 660, 59 L. Ed. 773, 35 Sup. Ct. Rep. 456; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. Ed. 417, 29 Sup. Ct. Rep. 220; Fox v. Washington, 236 U. S. 273, 59 L. Ed. 573, 35 Sup. Ct. Rep. 383; Omaechevarria v. Idaho, 246 U. S. 343, 62 L. Ed. 763, 38 Sup. Ct. Rep. 323; Miller v. Strahl, 239 U. S. 426, 60 L. Ed. 364, 36 Sup. Ct. Rep. 147; Tedrow v. A. T. Lewis & Son Drygoods Co., 255 U. S.

98, 65 L. Ed. 524, 41 Sup. Ct. Rep. 303; Weeds v. United States, 255 U. S. 109, 65 L. Ed. 537, 41 Sup. Ct. Rep. 306; and Kinnane v. Detroit Creamery Co., 255 U. S. 102, 65 L. Ed. 531, 41 Sup. Ct. Rep. 304."

This rule of law has also been stated by this Court in the case of Connally vs. General Construction Company, 269 U. S. 385, 396; 70 L. Ed. 322, as follows:

> "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

The following penal statutes have been held unconstitutional as fixing too uncertain a "standard of conduct".

In the case of Connally v. General Construction Company, supra, a statute of the State of Oklahoma, which required a contractor under penalty to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed", was held unconstitutional on this ground.

The statute which was held unconstitutional in the case of Cline v. Frink Dairy Company, supra, provided "that it is hereby made unlawful for any person wilfully x x x to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries".

A similar provision was held unlawful in the case of U. S. v. Cohen Grocery Co., 255 U. S. 89; 65 L. Ed. 520, and the above stated rule was reiterated in the recent case of Smith v. Cahoon, Sheriff, 283 U. S. 553; 75 L.Ed.1264,citing International Harvester Company v. Kentucky, 234 U. S. 216, 221; Collins v. Kentucky, 234 U. S. 634, 638; United States v. Cohen Grocery Company, 255 U. S. 81; Weeds, Inc., v. United States 255 U. S. 109; Connally v. General Construction Company, 269 U. S. 385, 391.

The statute in the present case violates the above announced principles. For example, it is made unlawful for any person to produce oil in such manner as to constitute "economic waste". What this term means must be based entirely on conjecture.

It may be assumed, of course, that the term refers to the waste of money, and in the light of Section 2, most probably means that oil shall not be sold at a price less than its "actual value" as determined by the price of the retail products. It might be intended, however, to prohibit the drilling of more wells than would be necessary to produce the maximum amount of oil from a given tract, or it could be intended, broadly, to make it unlawful for any operator to produce his wells at anything less than the maximum of financial efficiency.

It would be impossible in the ordinary course of business to operate any well with absolute financial or economic efficiency. What, then, would be regarded as waste? The useless spending of $100.00, $1,000.00, or $100,000.00? Where would the line be drawn? And even though the oil operator may sell his oil below the price which his neighbors consider adequate, the consuming public gains by reason of the saving which they may effect in the purchase of gasoline. Again, even though the oil operator spends more money than is absolutely necessary in the drilling of wells, the manufacturers of his drilling equipment and the laborers who depend upon these factories, gain in the increased business which they thereby acquire.

In fact, it is difficult to conceive that there could be any "economic waste" to the public at large in any of these situations.

The power of a state legislature to forbid financial inefficiency is a proposition concerning the merits of the main case (No. 485) and is not in issue here. It is certain, however, even assuming that a state legislature has such power, that the blanket prohibition of "economic waste" is capable of such a wide variety of interpretations that the average person would be at a loss to determine the scope and application of the term.

The term "underground waste" is also capable of many constructions. Dr. Ralph Arnold, a geologist of established nationwide reputation, testified that the term was of uncertain definition, even to the science of geology. (R. Vol. 1, P. 326). It might mean the dissipation of too much gas energy. It might refer to inefficient drilling which would allow water to saturate and ruin the oil-bearing sands. If it has either of these meanings, who shall advise the oil operator as to how much gas energy he shall be permitted to employ in the lifting of his oil, and who shall advise him as to whether his drilling methods are efficient or inefficient? Surely this "standard of conduct" is too indefinite to permit of a penalty in violation thereof; and if scientists are uncertain of the meaning of the term, how could the ordinary oil operator be expected to confine his operations within its scope, under the penalty of a drastic receivership if he makes a mistake in his interpretation.

Even more indefinite and uncertain is the prohi-

bition of the production of oil in excess of "transportation or marketing facilities or reasonable market demands", and the prohibition against the "taking of crude oil or petroleum from any oil-bearing sand or sands in the State of Oklahoma at a time when there is not a market demand therefore at the well at a price equivalent to the actual value of such crude oil". So palpably vague and uncertain are such provisions that a lengthy discussion would serve no purpose. The trial court was eminently correct in holding that the Act does not furnish a sufficient guide to constitute due process of law under the 14th Amendment.

III

The Receivership Provided by Section 9 is a Penalty.

It is clear that the legislature intended that such receivership should constitute a penalty, and not, as the defendant contends, a mere civil remedy. A reading of Sections 8 and 9 shows this intention.

Section 8 provides the penalty of fine and imprisonment.

Section 9 then provides that "*in addition* to any penalty imposed under the preceding section, any person violating the provisions of the Act shall be subject to have his producing property placed in the hands of a receiver".

The legislature, in effect, says: "We have provided one penalty in Section 8 for violation of the Act;

now we are providing an *additional* penalty in Section 9".

The receivership provided by Section 9 cannot be compared with injunction or mandamus. Those civil remedies are mere orders either to do certain things or to refrain from doing certain things. The receivership, on the other hand, is a damaging commitment of property imposed by the State to enforce the obedience to its mandates as set forth in the Act.

Just as a jail sentence imposed on a person places him in the custody of the State and thereby effectively prevents him from committing further offenses during his incarceration, so the receivership places the offending oil well in the custody of the State, and thereby prevents the commission of further offenses by such well. The receivership is, in fact, a jail sentence imposed on property.

The terms of the receivership are most onerous. First, there is no bond provided to protect the owner from loss by reason of the careless or malicious operation of the well. An inefficient or malicious receiver may so operate the well as to ruin its producing qualities, and if the receiver be financially irresponsible, the owner has lost his entire investment, without recourse or possibility of relief.

If the receiver be dishonest and embezzle the proceeds from the well to his own use, the well-owner in this case also is without protection.

Again, the receivership is indeterminate. No

bond can be posted by the well-owner to assure his future observance of the law. No court is authorized to dissolve the receivership upon any showing that the receivership has served its purpose.

According to the provisions of the Act, the well may be kept in the hands of the receiver so long as it produces oil, or until the State, at its pleasure, chooses to return the property to its rightful owner.

The defendants in their brief refer to the general Oklahoma statute regarding receiverships (Ch. 3, Art, 19, C. O. S. 1921). This statute, however, provides only for receiverships in the ordinary cases to which receiverships have always been applied. It makes no provision whatever for a receivership of property which has been used in the violation of the law, unless such a recieversḥip be included in the provision, "In all other cases where receivers have heretofore been appointed by the usages of the courts of equity".

It is the belief of plaintiff, however, that it has not been the general practice of courts of equity to authorize a receivership for such purpose, and that the safeguards provided in the general statute above cited do not apply to the receivership provided for in Section 9 of the Curtailment Act. It appears, in fact, to plaintiff that the receivership provided for in Section 9 is merely a sequestration of property in disguise—a criminal penalty under a civil label.

The greatest demand of modern business is free and ready credit. Any act which will deprive a business of that confidence required for the maintenance of its credit, is the most severe kind of injury and would cripple a business far more than the payment of a fine. Such crippling of credit would be the almost inevitable result of the imposition of a receivership upon the producing properties of an oil company. This factor alone makes the receivership provided by Section 9 not only a penalty but a far more drastic and severe penalty than the fine and imprisonment provided in Section 8.

As corroborative of this proposition, the facts of this case show that when actual prosecution was started, the Attorney General selected the receivership in preference to the penalties provided in Section 8, which the State had been threatening to enforce, as the most effective method, not only of preventing recurrence of what he considered violations of the statute, but also as the most vivid method of making an example out of the plaintiff company to show other possible offenders the injury which the State might inflict for any infraction of the law.

The receivership has all of the attributes of a common penalty. It is so drastic and severe that the fear of its imposition serves to prevent any attempt to violate the statute, and if the statute be violated, it serves to place the offending property in the custody of the state so that the offense cannot be repeated. These attributes are entirely unlike those

of the civil remedies of injunction and mandamus, and resemble more the seizure of contraband goods, and the forfeiture of property used in law breaking, such as automobiles used to transport intoxicating liquor.

A ruling on this proposition need not turn, however, upon the technical definition of the term "penalty". In all events, it is apparent that the receivership imposed by Section 9, would inflict a serious injury upon any person against whom it might be enforced. This being so, the due process of law required by the 14th Amendment demands that the Act prescribe some fixed, definite and certain standard by which all persons may know how to control their conduct so as to escape such injurious imposition.

IV.

The State has Attempted to Enforce Against this Plaintiff the Penalties Provided in Sections 8 and 9 and the Constitutionality of such Sections is Therefore in Issue in this Case.

The allegations of the Second and Third Amended and Supplemental Bills of Complaint show clearly that the penalty sections were in issue. The Third Amended and Supplemental Bill of Complaint, upon which this case was tried in the court below, alleges fully that the Attorney General had filed his petition,

> "wherein it is prayed that the court appoint a receiver to take possession of the producing properties of the plaintiff herein, located in the Oklahoma City oil field upon the lands hereinbefore described, alleging as cause therefor that this plaintiff has violated the provisions of the Act of the Oklahoma Legislature approved February 11th, 1915, * * *."

This bill further alleges that the trial court thereafter on application of this plaintiff entered its order

> "restraining the defendants Paul Walker, E. R. Hughes and C. C. Childers, individually and as members of the Corporation Commission of the State of Oklahoma, and the defendants Louis R. Morris and J. Berry King, from instituting *any proceedings* against this plaintiff under any of the penalty provisions of the above described oil conservation law, and further ordering the said J. Berry King to dissolve the restraining order in the receivership suit hereinabove described; * * *."

This bill then alleged that the institution of proceedings

> "*under the provisions of sections* 8 *and* 9 *of the Act of the Oklahoma legislature* approved February 11th, 1915, or other proceedings will destroy plaintiff's financial credit and embarrass it in the operation of its business, * * * * *."

and the bill then asked in its prayer that the defendants

> "be temporarily and permanently enjoined from instituting proceedings against this plaintiff under the provisions of sections 3498 and 3499, Compiled Oklahoma Statutes, 1921, and from causing proceedings to be instituted against this plaintiff under the provisions of sections 8 and 9 of the Act approved February 11th, 1915; * * * * *."

The Second Amended and Supplemental Bill of Complaint reads, over the verification of Plaintiff:

> "that the aforesaid defendants, acting as Corporation Commissioners of the State of Oklahoma and as such Commission are threatening to punish this plaintiff and impose upon it the penalties prescribed by statute, including a receivership for its properties".

The definite allegation that defendants were threatening to impose the fines provided in Section 8, as fully set forth in the Second Amended Bill, must have been omitted from the Third Amended Bill through oversight, as the Third Amended Bill was, by agreement of counsel, filed at the trial, and was intended merely to consolidate all the pleadings of plaintiff which had been filed theretofore, and was not intended to change any of the issues as set forth

in the second bill and the mesne pleadings filed subsequent thereto.

The answer of Defendants to this Third Amended Bill not only fails to deny that the State was threatening to impose the fine provided for in Section 8, but by inference admits that such was the case, as follows:

> "They (defendants) further allege that the loss to plaintiff by having to pay fines imposed by defendants under the penalty provisions of said statute for violations of the said orders during the pendency of this suit, would not be comparable to the much greater losses which would be sustained by the owners of oil wells upon lands adjacent, etc., * * *". (R. vol. 1, pt. 1, p. 72).

The final decree of the trial court reads, with reference to the penalty sections:

> "* * *; that Sections 8 and 9 of said Act (Sections 7961 and 7962 of the Compiled Oklahoma Statutes 1921), being the penalty provisions of said Act, are not valid; to which the defendants and each of them excepts; that the defendants, J. BERRY KING, Attorney General of Oklahoma and LEWIS R. MORRIS, County Attorney of Oklahoma County, Oklahoma, and each of them, their servants and employees be, and they are hereby perpetually enjoined and restrained

> from enforcing or attempting to enforce the provisions or any part thereof of said Sections 8 and 9 of said Act; to which the defendants and each of them excepts; * * *". (R. vol. 1, pt. 2, p. 248).

The record in the case discloses, therefore, that the Attorney General of the State was not only threatening to, but had actually commenced prosecution under Section 9 of the Act; and that prosecutions under Section 8 had been threatened. The record further shows that the trial court on plaintiff's application had entered an interlocutory injunction restraining the Attorney General from continuing his prosecution under Section 9, ordering him to dismiss the receivership action and enjoining him from carrying out any threatened prosecution under Section 8.

This interlocutory order reads as follows:

> "Now, therefore, it is ordered and adjudged until the further order of this court, that the defendants, Paul Walker, E. R. Hughes and C. C. Childers, individually and as members of the Corporation Commission of the State of Oklahoma, and all persons acting by or under them be and they are hereby enjoined from instituting any proceedings against the plaintiff under the provisions of Sections 3498, 3499 and 7959, Compiled Oklahoma Statutes, 1921, on account of alleged violations of said proration order or or-

ders; that the defendant, Lewis R. Morris, individually and as county attorney of Oklahoma County, Oklahoma, and J. Berry King, individually and as Attorney General of the State of Oklahoma, and all persons acting by, through or under them, be and they are hereby enjoined from instituting or prosecuting receivership proceedings against the plaintiff under the provisions of Section 7962, Compiled Oklahoma Statutes of 1921.

* * * *

"It is further ordered and adjudged that J. Berry King, as Attorney General of the State of Oklahoma, immediately take the necessary action to dissolve the restraining order or temporary injunction heretofore issued in Cause No.....", entitled, "State of Oklahoma, ex rel. J. Berry King, Attorney General versus Champlin Refining Company", now pending in the District Court of Oklahoma County, Oklahoma." (R. vol. 1, pt. 2, p. 374).

Such interloctutory injunction came on for hearing at the trial on the merits on plaintiff's prayer in its Third Amended and Supplemental Bill of Complaint that said interlocutory injunction be made permanent. The decree of the trial court granted plaintiff's petition as to the penalty sections, and made permanent the interlocutory injunction as to Sections 8 and 9. From this decree, the defendant,

Corporation Commission, has appealed as to the validity of the penalty sections.

We cannot see, in the light of the record, how it can be denied that either Section 8 or Section 9 is involved in this case. It is true that there is no testimony in the appellate record showing the threatening prosecutions under Section 8. This may be explained in part by the fact that most of the evidence on the penalty sections was presented at the hearing on the interlocutory injunction prior to the hearing on the merits. It is sufficient, however, that in the Second Amended and Supplemental Bill of Complaint, the plaintiff alleged over its verification that prosecutions had been threatened under Section 8, which allegations were not denied by the defendant, either in its answer or in the testimony presented in its behalf.

The statement in brief of defendant, that the proceedings which had been instituted by the Attorney General to enforce the penalty of Section 9 against this plaintiff, were subsequently dismissed, should not be read so as to infer that these proceedings were dismissed voluntarily. Such is not the fact of the case. They were dismissed upon order of the court as hereinabove described and at the trial on the merits, this injunctitve order was made permanent. Under such circumstances, it is clearly apparent that the Attorney General was threatening to renew the proceedings, and that it was en-

tirely proper for the trial court to issue its permanent injunction against such action.

The further statement in brief of defendant that the Attorney General had dismissed his action "some time before the trial of this cause" should not be misinterpreted. The fact is that the interlocutory order was entered on June 13th, 1931 (R. Vol. 1. pt. 2, p. 373), and the trial on the merits was ordered ten days later, that is, on June 23, 1931. As explanatory of this proceeding, the Plaintiff might say that it had been resting its case up to that time on an appeal from the decision on a former interlocutory injunction, which appeal is now pending in this Court as case No. 122 of this term When the interlocutory order of June 13, 1931, was entered, however, the effect thereof was to give the plaintiff the right to produce sufficient oil to at least partially operate its refinery, and the defendant, Corporation Commission, thereupon insisted that the entire case be immediately tried upon its merits. Their request was granted and the case was tried upon ten days notice as hereinabove described.

Plaintiff respectfully submits in summary that the penalties prescribed in Sections 8 and 9 of the Oklahoma Curtailment Act are in violation of the 14th Amendment to the Federal Constitution in that the standard of conduct prescribed in said Act is so vague and indefinite as to deny due process of law.

Plaintiff further submits that the receivership prescribed in Section 9 is a burdensome penalty as well as the fine and imprisonment prescribed in Section 8, and that, since the state has actually commenced receivership proceedings and continually threatened the imposition of fines under Section 8, both sections are properly within the issues of this case.

Plaintiff respectfully asks that the decree of the trial court holding void these penalty sections be by this Court affirmed.

Respectfully submitted,

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